accordance with the code provisions; that is, to sell at public auction after notice of the time and place had been properly served upon the buyer. Otherwise the unpaid seller may find himself in the unenviable position of a man who, by unconsciously rescinding his contract, is unable to hold the buyer for any deficiency which may remain between the sum obtained at the sale and the contract price. *L. N. H.*

SURETYSHIP: BUILDING CONTRACTS: EFFECT ON THE SURETY'S LIABILITY OF PREMATURE PAYMENT BY THE OWNER TO THE CONTRACTOR—It is an elementary doctrine that a surety is entitled to stand on the express terms of the contract between the principal and the creditor;[1] thus the general rule in regard to a building contract is that payment by the owner otherwise than in the manner provided in the agreement, without the surety's consent, releases the latter. The leading case establishing this rule is Calvert v. London Dock Company.[2] There the alteration in the manner of payment to the contractor by the owner, without the knowledge or consent of the surety, was held to have discharged the latter, even though the alteration may have benefited him. That case has been expressly approved in California in Bragg v. Shain and the rule has been followed not only in a later decision in this state (Kiessig v. Allspaugh[4]), but in many other states of the Union,[5] and except where there is a suit on a bond designed for the protection of material men and workmen,[6] also in the Federal courts.[7]

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[1] Sterns on Suretyship (2d ed.) § 76b; see Tally v. Parsons (1901) 131 Cal. 516, 63 Pac. 833.

[2] (1838) 2 Keen 639, 48 Eng. Rep. R. 774.

[3] (1874) 49 Cal. 131.

[4] (1891) 91 Cal. 231, 27 Pac. 655, 13 L. R. A. 418. See Eppinger v. Kendrick (1896) 114 Cal. 620, 626, 46 Pac. 613.

[5] Chester v. Leonard (1897) 68 Conn. 495, 37 At. 397; Gato v. Warrington (1896) 37 Fla. 542, 19 So. 883; Finney v. Condon (1877) 86 Ill. 78; St. Mary's College v. Meagher (1889) 11 Ky. Law Rep. 112, 11 S. W. 608; Backus v. Archer (1896) 109 Mich. 666, 67 N. W. 913; Simondson v. Thori (1887) 36 Minn. 439, 31 N. W. 861; Evans v. Graden (1894) 125 Mo. 72, 28 S. W. 439; O'Rourke v. Burke (1895) 44 Neb. 821, 63 N. W. 17; Truckee Lodge v. Wood (1879) 14 Nev. 293; City Council v. Ormand (1897) 51 S. C. 121, 28 S. E. 147; Bell v. Trimby (1896) 38 S. W. 100 (Tenn.); Sanders v. Hambrick (1897) 16 Tex. Civ. App. 459, 41 S. W. 883; cf. Smith v. Molleson (1895) 148 N. Y. 241, 42 N. E. 669.

[6] Such as bonds provided for in materialmen's statutes. See Equitable Surety Co. v. McMillan (1914) 234 U. S. 448, 58 L. Ed. 1394, 34 Sup. Ct. Rep. 803; Ill. Surety Co. v. John Davis Co. (1917) 244 U. S. 376, 61 L. Ed. 1206, 37 Sup. Ct. Rep. 614; Chaffee v. U. S. Fidelity & Guaranty Co. (1904) 128 Fed. 918, 63 C. C. A. 644; U. S. Fidelity & Guaranty Co. v. Omaha Building &c Co. (1902) 116 Fed. 145, 53 C. C. A. 115; U. S. Fidelity &c Co. v. Pressed Brick Co. (1903) 191 U. S. 416, 48 L. Ed. 242, 24 Sup. Ct. Rep. 142; Hill v. American Surety Co. (1906) 200 U. S. 197, 50 L. Ed. 437, 26 Sup. Ct. Rep. 168.

[7] Prairie State Bank v. U. S. (1896) 164 U. S. 227, 41 L. Ed. 412, 17 Sup. Ct. Rep. 142; Fidelity & Deposit Co. v. Agnew (1907) 152 Fed. 955, 82 C. C. A. 103; O'Neill v. Title Guaranty &c Co. (1911) 191 Fed. 570. And see Morgan Co. v. Branham (1893) 57 Fed. 179, where the sureties were released,

Until Bateman Brothers v. Mapel,[8] this was thought to be the rule in California. But the latter case, without mentioning Calvert v. London Dock Company, or the California decision approving it, distinctly held that, though the owner made loans or advances to the contractor which were not provided for in the contract, the surety was not released. In the Bateman case, supra, the court laid stress on the fact that the surety was not prejudiced. But it must be remembered that according to the Calvert doctrine, the question of prejudice is immaterial, any alteration in the mode of payment releasing the surety. It is true that the court speaks of the payments as loans, but it also speaks of them as advances in the latter part of its decision. It is hard to see how they differ from the advances made in Calvert v. London Dock Company, save in amount. And by statute in this state, a surety, like a guarantor, is exonerated, except in so far as he may be indemnified by the principal, by any act of the creditor which alters the original obligation without the surety's consent.[9]

The next holding of importance in California on this subject is County of Glenn v. Jones.[10] That case returned to the Calvert doctrine without mentioning Bateman Bros. v. Mapel, releasing the sureties because of premature payment of the contractor by the owner. The latest ruling on this question is *Union Oil Company v. Pacific Surety Company*.[11] Without discussing any of the earlier California decisions the Supreme Court refused to release the sureties from their obligations even though advances, differing from those provided by the original contract, had been made to the builders.

We thus have two opposing doctrines: the Calvert doctrine releasing the surety for any alteration in the contract, even though such alteration may have benefited the surety, and the more liberal rule, releasing the surety only to the extent that he is prejudiced.

It would seem that from a business point of view, the principal case, following the more liberal rule, is correct. Such a rule is commercially convenient; often a contractor, in undertaking work of great magnitude, is able to proceed only with the aid of judicious loans. The owner is usually anxious to have the work completed as speedily as possible. Expeditious performance of the contract is also generally to the advantage of the surety. It seems absurd to urge that the wheels of industry be clogged with an antiquated technical rule forbidding the owner to help the contractor, the surety and himself. But from an examination of the law in this state, it is rather difficult to ascertain which rule has been adopted.

There is, to be sure, one feature distinguishing the principal

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even though the owner was induced by the fraudulent representations of the contractor to make a premature payment. (St. Mary's College v. Meagher, supra, n. 5, accord.)

[8] (1904) 145 Cal. 241, 78 Pac. 734.

[9] Cal. Civ. Code, §§ 2819, 2840.

[10] (1905) 146 Cal. 518, 80 Pac. 695.

[11] (Jan. 1920) 59 Cal. Dec. 86, 187 Pac. 14.

case from the earlier California decisions, and that is the fact that ostensibly the loan was made not by the owner, the Union Oil Company, but by a distinct and separate corporation, known as the Transportation Company. But it is apparent that the loan by that company was a mere evasion, induced no doubt by the desire to help the contractor and thus insure the completion of the work, without risking a possible release of the sureties. The majority of the stock of the transportation company was owned by the oil company; the most important official of both companies, the general manager, was the same person, and the money was advanced by the oil company to the transportation company, which then loaned it to the contractor. If the contractor had sued the oil company, would not the latter have pleaded payment? Would it not have urged that the transportation company was the mere agent of the oil company, delegated to pay the contractor? The answer seems obvious.

If the Calvert rule is the law in this state, as the earlier cases, which have never been overruled, seem to say, it should be confined to facts identical with those of that case. Probably that is what the court in the principal case meant to do. If so, why not say so? *H. S. J.*

Book Reviews

CASES ON THE LAW OF EVIDENCE. By Edward W. Hinton, Professor of Law in the University of Chicago. American Casebook Series. West Publishing Company, St. Paul, 1919. pp. xxiii, 1098.

The publishers of the American Casebook Series are to be congratulated on having added to their list a first-class casebook on evidence. It is probable that no two teachers of the law of evidence would agree on the proper analysis, method and order of presentation of the topics, but there is excellent material here that anyone teaching evidence by the casebook method should be able to use with advantage. The cases are well selected, both ancient and modern. It is by no means easy from the enormous mass of material to select striking cases that bring out clearly fundamental principles. The author has done his work well and the cases are right up to date. For example, there is included Rosen v. United States (1918) 245 U. S. 467, 62 L. Ed. 406, 38 Sup. Ct. Rep. 148, where the Supreme Court declared itself no longer bound by the ancient rules of evidence and permitted the testimony of a witness convicted of perjury. The case shows a marked tendency in the courts to resume their former control of rules of procedure and evidence and to refuse to be confined in straight-jackets of their own making.

The casebook is scholarly, drawing upon the investigations of